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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re O.J. et al., Persons Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

LYNN T. et al.,

Defendants and Appellants.

G040271

(Super. Ct. Nos. DP002572 &
DP011375)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, John C.
Gastelum, Judge. Affirmed.

Gita M. Varughese, Laura L. Furness, under appointment by the Court of
Appeal, for Defendant and Appellant Lynn T.

Niccol Kording, under appointment by the Court of Appeal, for Defendant
and Appellant Jerry J.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen, and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

Leslie A. Barry, under appointment by the Court of Appeal, for the Minors.

* * *

Lynn T. (Mother) and Jerry J. (Father) appeal from a juvenile court order terminating their parental rights to their eight-year-old son, O.J., and seven-year-old daughter, K.J. Father contends the “parental benefit” exception found in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i),¹ should have prevented the termination of his parental rights. Mother argues the court erroneously denied her section 388 modification petition seeking reunification services. Both parents challenge the court’s finding the children were adoptable. We find the arguments raised lack merit and affirm the juvenile court’s order.

I

In February 2005, O.J. and K.J. were taken into protective custody with their older half-siblings Nic.J. and Nik.J. Mother admitted she was addicted to methamphetamine. She used drugs three times a day. For the past two months, the children had been staying with maternal relatives, who had verbally agreed to care for them while Mother addressed her drug addiction. O.J. and K.J. were staying with their aunt and uncle (Mr. and Mrs. E.). The petition alleged Father had a previous drug and criminal history. It was also alleged Father and Mother had verbal altercations in front of the children. Mother and Father were married in 2000, and separated in December 2004.

The children had previously been brought into protective custody in 2000 when O.J. was born with a positive drug screen for methamphetamine. There were also allegations of neglect and drug usage by the parents. The parents complied with their

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

service plan and reunified with the children, and those dependency proceedings were terminated in 2002. Mother relapsed in June 2003.

O.J. and K.J. were placed with the E. family. Their half-siblings were placed with other maternal relatives. At the detention hearing held in the middle of February 2005, the court ordered monitored visits with the children and twice weekly random drug tests. The parents were given a reunification plan to participate in a domestic violence program, counseling, parenting education, substance abuse testing, and a 12-step program.

Two months later, in April 2005, the social worker reported the parents had failed to comply with any services or drug testing. Father had not provided the social worker with a mailing address. Mother did not show up for her first parenting class. The social worker had not been able to arrange visitation because she had no contact information from the parents. After several continuances, the jurisdiction hearing was held at the end of May 2005. Mother and Father pled no contest to an amended petition. The parents had not yet complied with any services.

A few months later, the social worker reported Mother's referrals for parenting and counseling had been terminated due to her failure to appear. She had stayed only a few days in a drug rehabilitation center. Mother refused to drug test, explaining, "why should I test when I know it will be dirty." Her visits with the children were sporadic, and she was often late. During one visit in early June, she cried for 15 minutes, and when Father went to hand her a clean shirt, she stated, "I hope it is a knife." The social worker stated this was troubling, as Mother made this statement in front of her children "with complete disregard for the effect it would have on them." At the end of June, Mother was in a psychiatric hospital. She was released for a few days, but then was re-admitted. Mother also threatened suicide in front of Nic.J. and passed out on the caretaker's couch.

On the other hand, Father was working on his case plan. He was accepted to a six-month drug treatment program called “Set Free Recovery Program.” His visits with the children were “going very well.” He was visiting consistently and on time. The social worker had received all positive reports. During one visit, a staff member observed K.J. exit the elevator and greet her father with open arms, saying “with love and admiration” and “Daddy, I love you.” He began drug testing in mid-May, and other than missing two tests, had been testing clean. Father began attending Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings. Father’s visits were increased. Because Father had found more stable housing, the social worker was able to provide referrals for parenting classes and counseling. He obtained a temporary restraining order against Mother after she created a scene to “get him kicked out of the [rehabilitation] program.” The social worker was pleased with Father’s progress and noted Father’s biggest current challenge was finding employment.

On July 14, 2005, the court declared O.J. and K.J. dependents of the court and granted Father reunification services. The court denied Mother services pursuant to section 361.5, subdivision (b)(13).

In the October 2005 report, prepared for the six-month review hearing, the court was informed Mother lived at Daylight Again Substance Abuse Treatment Home and she was searching for employment. Father rented a room and was working in construction four to five days per week for Ford Framing Company. Father was actively participating in church activities, AA/NA meetings, the substance abuse program, individual counseling, and parenting classes. His twice weekly drug tests had all been negative. However, Father had not enrolled in a domestic violence or anger management program, claiming it was unnecessary.

The children had adjusted well to their placement with the E. family, but these caregivers were unsure as to their commitment to adoption. The children’s counseling social worker reported neither child was presenting further emotional or

behavioral issues. The children enjoyed weekly monitored visits with Father. Mother's monthly visitation was deemed "appropriate overall," but she had some unauthorized contact with Father and the children.

The social worker recommended family reunification services be continued for Father. She noted Father visited the children consistently and loved them. He had been "cooperative and compliant" and made significant progress in his case plan. The social worker was concerned about father's refusal to complete the services by enrolling in a domestic violence or anger management program. Although some of the other services "may touch on some aspects related to anger management . . . [t]he undersigned holds reservations about the father's insight into these issues and the consistency of demonstration of significant change." The social worker recommended additional services to strengthen Father's parenting and coping skills and to further address the issues which brought the children into the dependency system.

The parties stipulated to continue the hearing to give Orange County Social Services Agency (SSA) an opportunity to evaluate whether unmonitored visits would be appropriate for Father. At the next hearing in mid-October 2005, the court ordered further services for Father. He began having unmonitored visits with the children in November. In a report prepared in December, the social worker noted Father often took the children to the park and "insured that the children's needs were met, such as providing food." He was employed, participating in his case plan services, and consistently visiting with the children. Upon SSA's request, the court amended Father's case plan to include a 10-week anger management program in place of the domestic violence requirement.

Unfortunately, Mother was not doing as well. She had been terminated from her sober living facility, she reported feeling depressed, and she admitted she was forgetting to take her medications. She visited the children for only a few hours once a month. In October, she was briefly hospitalized due to her failure to take psychiatric

medications. In November, she entered a sober living motel. She started taking her medication and looking for work. Mother reported she was pregnant.

In the report prepared for the 12-month review hearing, the social worker stated Father completed his therapy, parenting, and anger management class in April 2006. He was participating in the substance abuse programs and regularly tested negative. The children were enjoying more liberal visitation and had their first overnight in mid-March. The social worker opined, “[Father] has completed his case plan services. He has consistently visited the children and expresses concern for their safety and well being. [Father] provides for all the needs of the children, when they are in his care. [Father] has been observed to be affectionate and attentive to the children, as well as to provid[ing] guidance and direction when needed.” However, she recommended an additional six months of services because Father had not yet secured adequate housing for him and the children. He currently rented a room in a house, but the children cannot join him because of a roommate’s criminal history. Father stated he could not afford most apartments and he had been looking for a different room to rent. The social worker stated she submitted a family unification application for housing assistance. She believed that given more time, there was a substantial probability the children would reunify with their father.

The social worker’s recommendation changed in the August 2006 report prepared for the 18-month review hearing. The social worker opined services should be terminated and the case set for a permanency hearing. Father had abruptly stopped complying with his case plan. He did not submit to any drug tests between late April and early August 2006. He had been evicted from his rented room and ceased contact with the social worker. The children reported Father brought two friends to an overnight visit at the end of May. They said he had been sleeping during visits, and they once sat in the car with him while he slept. The caretakers reported Father had lost weight, was

spending less time with the children, and was not calling the children regularly. Father stopped visiting them in mid-June. The caretakers suspected Father was using drugs.

Mother gave birth to a boy in August 2006. She had become more consistent with her visitation with the children, but rarely contacted them by telephone. She had been diagnosed with bipolar disorder and was receiving counseling and medication.

The E. family informed the social worker they were not interested in providing a permanent placement for the children. The E. family had provided a nurturing stable home environment, and the children had responded well and made improvements in their development and behavior. However, the caretakers described the children as being “very hyper at times and that they have difficulty following directions.” On a daily basis they had to intervene and redirect the children, and the children “antagonize each other, tease others, yell and run around, and lie to avoid consequences.” The social worker stated, “The caretakers love the children, but have two children of approximately the same ages and they have expressed that they are tired.” The children were transitioned to a different maternal aunt and uncle (Mr. and Mrs. I.).

In late August, Father reconnected with SSA. Father admitted he was arrested for possessing drug paraphernalia and his car was impounded. Father realized he had become involved with people who “were into a lot more things than I knew.” After initially denying a drug relapse, Father later conceded he was again using drugs. He agreed to start drug testing again, and he obtained new attendance cards for AA/NA. The social worker reported on a monitored telephone call between Father and the children at the end of August. O.J. asked Father why he had not seen them and where he had been. Father replied he had been looking for work. K.J. then stated she missed Father and she wanted the family to be together. Father told the children, ““We have to start over,”” but added, ““Things are never too late. Just pray to Jesus.”” In the rest of the conversation, they talked about the children’s toys and school. The children said they were having fun.

In September and October, Father tried to get back on track to reunify with his children. He attended many 12-step meetings (over 60 meetings) and recovery group sessions. All of his drug tests were negative. In early September, he visited the children for the first time in several months. The children were happy to see him. He admitted to them he had “messed up.” K.J. cried at the end of the visit. During his absence, the children had a difficult time understanding why they could not see him. K.J. was seen pouting more frequently and saying everything is unfair. O.J. did not appear to be as emotional, but he threw the family puppy to the ground in mid-July, breaking the dog’s leg. On October 16, 2006, the court terminated Father’s reunification services and set a permanency hearing for February 2007. It authorized continued drug testing as well as two hours of visitation each week.

In an SSA initial permanency hearing report, the social worker noted the children (now six and five years old) had lived out of their parents’ homes for over two years. Their caretakers were committed to adopting the children, described as playful, friendly, and attractive. The social worker recommended parental rights be terminated and the children be freed for adoption. She noted, “The children have expressed that they will leave it to the judge to decide what the best place is for them. However, it appears that the children have [grown] attached to the prospective adoptive parents as they look to them for comfort.”

Father continued to have weekly monitored visits with the children. It was reported Father was “generally attentive” and interacted with the children. However, the monitor noted Father was sometimes too stern with O.J. and made him feel badly. Father continued with drug treatment and was testing clean. Mother was also testing clean each week.

In February 2007, Mother submitted a section 388 motion. Mother stated that in December 2006 she graduated from a perinatal program and she was confident she would never return to a drug lifestyle. She lived in the Americana Sober Living Home

with her infant son, and returned to her care “on CRISP [Conditional Release to Intensive Supervision Program] like conditions.” She was required to drug test twice a week and attend three NA/AA meetings a week. She began drug testing on January 15, 2007, and the results of the tests had all been negative.

In a March 26, 2007, addendum report, the social worker confirmed Mother was living in the motel and her infant son was recently returned to her care under a plan of family maintenance. The social worker noted a child abuse registry report was filed in February 2007 regarding Mother. The report concerned an incident when the baby rolled off the bed and an iron landed on top of him. The report was sustained for general neglect. Mother was unemployed and received disability benefits. She volunteered at the coffee bar at serenity hall once a week, where she was paid \$20 plus tips. Mother was participating in mental health services at the Orange County Alcohol and Drug Abuse Services. Although she has been diagnosed with bipolar disorder, Mother admitted she had stopped taking her prescribed psychotropic medications over the past month without consulting her psychiatrist.

Mother was enjoying visitation once a week with the children. During visits, they played games and did crafts together. It was reported K.J. spent more time with Mother than her brothers. The children did not cry when visits ended. Mother ended visits early on several occasions. Mother was repeatedly warned to stop talking about the case with her children and to stop making promises of reunification. The visitation monitor reported Mother spoke in a low voice at times to the children so she could not be overheard.

The social worker stated the children had discussed some experiences they remember when living with their parents. They remembered their parents yelled a lot, and a form of punishment was hot sauce in their mouths. They recalled being left alone, and climbing out of their cribs because Mother would sleep for long periods of time. Relatives of the children stated K.J. was the favored child. The social worker noted

Mother spent more time with K.J. during visits and only K.J.'s artwork and photographs were displayed in Mother's room. When asked about why she did not have photographs of her older children, she replied pictures of all the children made her depressed.

O.J. consistently told the social worker he wanted to remain living with his caretakers. K.J. was less certain. She would vacillate between wanting the judge to decide, and wanting to live with her mother, with both her parents, and with her current caretakers. The social worker stated the children had recently "been exhibiting signs of anxiety and maladaptive behaviors." She opined the children were experiencing confusion and anxiety relating to the uncertainty of what will happen to them. For example, O.J. expressed fear of having to leave his placement. He had been misbehaving and then lying to his caretakers to avoid getting in trouble. O.J. was afraid he would have to leave if he misbehaved. K.J. was loving and affectionate with the caregivers, but at times she would say hurtful things to them. In March 2007, the children told the social worker Mother had talked to them about living with her. K.J. said Father was going to tell the judge to let the children live with him. K.J. said she did not know why she was sometimes rude to the caregivers. She felt afraid her parents would be mad if she stayed with the caregivers.

The children's therapist also believed the children were experiencing confusion and anxiety relating to their uncertain living situation. The children told the therapist their parents were promising reunification. The therapist stated it is difficult to work with the children regarding their feelings and adjustments when they are hearing different messages. O.J. told the therapist he is not going back to live with his parents.

In the next addendum report prepared one month later, dated April 26, 2007, it was reported the children were still acting out and having difficulty coping. The caretaker stated K.J. had stated during therapy she wanted the court process to be over.

Father obtained a temporary job, and he planned to find a permanent job at a car dealership. Father still participated in his drug treatment program, testing negative

weekly. Mother was still residing at the sober living motel, and her drug tests were also negative.

One month later, the social worker prepared an addendum report dated May 29, 2007. Father had transitioned to the after care phase of the substance abuse treatment program. He decided not to work for the car dealership because they could not accommodate his need to take time off for court. He was working short term inconsistently, and looking for employment. Mother continued to live at the sober living motel and drug testing negative. It was reported she still ended visitation with the children early, stating it was cold. K.J. continued to interact the most with Mother.

The following month, in the addendum report dated June 26, 2007, the social worker reported Father requested twice weekly drug tests and telephone calls with the children. During the monitored telephone calls, the children told Father they loved him, and he told them the same.

The caretakers reported the children were doing well overall. Their behavior had improved, but after Father's telephone calls they would have difficulty listening and following directions. O.J. told the social worker he was afraid about going to court because he did not want to live somewhere else. K.J. said she was confused about what she wanted. She also expressed fear Mother would become sad and angry if the children did not want to live with her.

In a second report filed the same day, the social worker reported Mr. and Mrs. I. indicated they no longer wanted placement of the children. Mr. I. stated his family could not "live like this" anymore. Father stated he heard there was some kind of argument at the caregivers' home, which made them decide not to adopt the children. Mother stated K.J. called her the night of the purported argument and was crying, saying she missed Mother. Mother spoke to Mr. I., who stated his family could not care for the children and live "in limbo" any longer. Mother said she asked him, "What did he think, I was going to just give up my kids."

The social worker requested a 180-day continuance “to allow for efforts to identify a prospective adoptive family.” She noted her recommendation had changed to say the children were difficult to place because of the lack of an “identified prospective adoptive placement for the children. The children’s good health, developmental, and attractive features are desirable characteristics sought by adoptive families. The children are considered adoptable based on similar profiles of children in [SSA] The children may be difficult to place due to being a sibling set.”

In mid-July 2007, the children were removed from their placement to Orangewood and then to New Alternatives Sibling Assessment Facility. The relative caretakers gave SSA only seven days to remove the children, stating that if the children were freed for adoption, they would reconsider adopting the children. Mr. I. explained the reason for the removal was because he was no longer willing to deal with the frustrating court system, SSA, or living his life “on hold.” He pointed out family reunification services were terminated in October 2006, and SSA recommended terminating parental rights in February 2007, which was five months ago.

Father filed a section 388 modification request, requesting further reunification services. Mother had also filed a section 388 modification request. The social worker filed a report recounting the past 20 months of the dependency proceedings. She concluded, “The children’s parents have not demonstrated that they are able to maintain their sobriety even after the completion of services including substance abuse treatment, counseling, and parent education. Based on their past behavior and actions, the undersigned is concerned that the parents will return to drug use even though they have again completed substance abuse treatment programs.” She noted O.J. was cared for by relatives for over a year during the first dependency case, and in the current case, the children have been away from their parents for two years and five months (and moved to three different placements).

The social worker noted Mother had been ending visitation early. The social worker learned from Nic.J.'s caregiver that Mother asked Nik.J. to bring sandwiches or money to buy food during the visits because she did not have money. She borrowed \$50 from Nic.J. Mother asked to borrow \$40 from Nik.J., or if he could ask for the money from his caregivers because she was out of toilet paper and food for the baby. During one visit there was a piñata and K.J. was the only child who got a bag of toys. K.J. said her mother gave her a stone and told her to hold it and rub it on her body so that she would know Mother was with her.

As part of a settlement reached August 23, 2007, the parents withdrew their modification petitions and the court continued the permanency hearing to February 2008. The parents were offered reunification services, including drug testing, drug treatment, counseling sessions, and psychiatric services (for Mother). The children were adjusting to their group placement. They had not displayed any concerning behavioral or emotional issues.

In early February 2008, SSA reported the children had been matched with a prospective adoptive parent, M.E. Factors cited for the delay in placement was the case's visitation requirements with the parents, and their status as a two-gender sibling set. Early in the process, the children were active, playful, and well behaved. They enjoyed regular visits from their parents and were doing well in school. By February, it was reported the children were distressed as they had seen so many other children leave the group home.

As for the parents, Mother remained in drug treatment and was testing. She had two positive tests in September 2007. She was asked to leave the sober living facility in March 2008. She visited the children consistently. Her counselor from the mental health agency, who was trying to help Mother find a new place to live, indicated Mother lacked motivation to do things for herself. The counselor was concerned Mother could not begin the "role of parenthood" for four children, in addition to the small child

currently in her care. Mother was provided referrals for personal empowerment and parenting education, but she failed to participate in these services. Father continued to visit the children for two hours a week. They met at a local park and library. By February 2008, he had stopped participating in other services.

After three years of being dependents of the court, the children met with social workers and their prospective adoptive parent, M.E., to discuss adoption. M.E. is a single mother with two teenage boys.

A few days later, the social worker met the children at their school, where they expressed excitement about visiting again with M.E. When the next visit occurred, M.E. brought a few gifts and played with the children. The children and M.E. “seemed at ease with each other and each expressed they are looking forward to a subsequent visit.” The next visit occurred at the beach where they further discussed adoption, and the children were relieved to know they could continue visiting their biological parents if adoption occurred. On March 21, 2008, the children were placed with M.E. It was reported the children quickly adapted to their new placement and school. They were excited to live with M.E., who expressed her commitment to caring for them and providing a stable, nurturing home.

At the beginning of April, Mother filed a section 388 modification petition requesting modification of the 2005 order denying reunification services, or the return of her children. She described her ongoing drug and mental health treatment, her ability to care for her infant son, and her continuous and pleasant visits with the children. The court determined Mother had at best exhibited changing rather than changed circumstances. Her housing situation was unstable, she had several positive drug tests that exhibited faulty judgment, and her mental health counselor doubted her fitness as a parent. The court also noted there was no prima facie showing the order would be in the best interest of the children, who were enjoying some stability in their placement with

M.E. The court determined there was no evidence to justify further delays to wait for the parents to remedy their situations. The court summarily denied the petition.

On the same day, the court held the permanency hearing. The social worker opined the children were adoptable, but opined continued visitation with the parents was also “essential” for the children. He clarified his recommendation to terminate parental rights was not predicated exclusively on the assumption M.E. would permit such contact. However, he found it relevant that M.E. had indicated she was open to visitation with the parents after adoption. He recalled that when he asked the children where they wanted to live, they always indicated they wanted “a permanent home or a long-term home to stay in.”

The court also heard testimony from the children. O.J. testified he enjoyed visits with Mother and Father and wanted to continue seeing them. O.J. testified that during visits with Father, they exchange hugs, but not kisses. He denied exchanging sentiments such as “I love you” to each other. He said playing was the best part of his visits with Father. He indicated the social worker had not explained the concept of adoption to him. K.J. testified she also enjoyed visits with Mother and Father and she wanted to continue seeing them. K.J. exchanged hugs, but not kisses with Father. She recalled they would say, “I love you.” K.J. testified she understood that adoption is “when you live for someone forever.” When asked if she wanted to live with Father forever, she replied, “I don’t know.” However, K.J. testified she did want to continue visiting with Father forever.

Mother testified she never obtained unmonitored visitation, but she believed the children would benefit more from continued visitation with her and the older siblings than from an adoptive home. Father testified that before his relapse, he enjoyed unmonitored visits with the children. He described visits as affectionate, playful, and enjoyable. The children usually call him daddy. Father believed continued visitation would outweigh the benefit of an adoptive home.

The court found the children adoptable, noting they were “indeed likeable, friendly, and very charming children.” The court acknowledged the children had recently been transitioned to M.E.’s home who was committed to adoption, but there was “no evidence presented whatsoever to the court that these children are not adoptable or that even if the current placement failed that there would not be other families ready and willing to adopt these children.”

As for the benefit exception, the court determined the evidence showed the children missed Father, but did not seem to suffer “any great harm” during his relapse-spurred missed visitation in 2006. The court interpreted the social worker’s comment continued contact was “essential” as meaning continued contact, if possible, would be good for the children and consistent with their wishes. It noted the children did not look to Father for comfort during visits and were not emotionally upset when visits ended. It found the children viewed visits as “a fun playdate or playtime that they have” with Father. The court concluded that because the evidence strongly indicated the children strongly desired a long-term, permanent home, and M.E. was willing to facilitate contact with the parents as long as it was in the best interest of the minors, the benefit exception did not apply. The court terminated Mother’s and Father’s parental rights.

II

A. Mother’s Modification Petition

Mother maintains the juvenile court’s denial of her section 388 petition requesting reinstatement of reunification services was an abuse of judicial discretion because the court misunderstood the level of proof required to entitle a party to a hearing. She argues the court erred in characterizing her showing as one of merely “changing circumstances,” and not changed circumstances. Mother claims, “The question before the [juvenile] court was not whether [she] had demonstrated the ability to have her children returned immediately, but a change in circumstances from when the subject order was made.” We disagree.

To briefly summarize the applicable law: A parent may, on grounds of change of circumstance or new evidence, seek modification of a previous order of the court so as to serve the child's best interest. (§ 388, subds. (a), (c).) At any time before the section 366.26 hearing, a parent may file a section 388 petition seeking reinstatement of reunification services based on changed circumstances. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308-310.) It is the parent's burden to show, by a preponderance of the evidence, there has been a sufficient change of circumstances to warrant the requested modification, and that the requested change of order is in the child's best interest. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532-535; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*).) After termination of reunification services, a parent's interest in the care, custody, and companionship of her child is no longer paramount. By this point, the court's focus has shifted squarely to the child's need for permanency and stability. Accordingly, the parent's burden is particularly weighty when the section 388 petition is made on the eve of a section 366.26 permanency-planning hearing, when the children's interest in stability is the court's foremost concern and outweighs any interest in reunification. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464; see also *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

We review the juvenile court's denial of a section 388 petition for an abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.) "We must uphold the juvenile court's denial of appellant's section 388 petition unless we can determine from the record that its decisions "exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the [juvenile] court." [Citations.]' [Citations.]" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

This case is somewhat unusual in that the parties reached a settlement regarding reunification services, after over two years of dependency proceedings.

Noticeably absent from Mother's brief is any mention of what was essentially an unheard of accommodation from the juvenile court. The record shows, and the other parties discuss, Mother's first section 388 petition filed in March 2007, on the eve of the first permanency hearing, resulted in the court offering her reunification services. It is worth noting, the court found there existed *changed circumstances* and granted Mother a hearing. At that time, Mother had demonstrated a new found resolve to keep custody of her newborn son under a plan of family maintenance. Mother fails to acknowledge the significance of her modification petition being withdrawn as a result of a settlement providing *both* parents with court-ordered services and continued visitation. Specifically, in August 2007, the court authorized "funds to pay for the services to parents listed herein" including, drug testing, counseling, parenting classes, drug treatment, and "psychiatric services (for Mother)[.]" Thus, the original July 2005 order denying services *was modified* in August 2007.

The permanency hearing was continued several times to give SSA additional time to find a new placement for the children. It is undisputed that over the next eight months Mother received services. She drug tested and participated in 12-step meetings. She had only a few positive test results, which she believed were due to prescription medications. For example, she attributed one positive test to the cough syrup she took that belonged to another resident at the sober living home. The other positive tests related to a surgical procedure. The evidence shows Mother was taking steps to address her mental stability issues, by regularly taking her prescribed psychotropic medication and participating in counseling. However, Mother refused the social worker's referrals to parenting classes or any type of domestic violence program, even though these were two problems which led to the children's dependency.

Mother filed a second section 388 modification petition on April 1, 2008, the date set for the second permanency hearing (continued from its originally set dates of February 21, and March 10 and 12). She alleged the changed circumstances of over a

year of sobriety and the retained custody of her infant son, warranted modification of the July 2005 order denying services or for the court to return custody of her other children. On appeal, she dropped her contention the court should have changed its order removing custody, and we deem the matter waived. Mother only contests the court's refusal to hold a hearing to modify the July 2005 order denying services. But in light of the August 2007 court order authorizing some services, and Mother's failure (below or on appeal) to specify what additional services she required, it cannot be said the court abused its discretion.

Moreover, the court was right in denying a hearing. It did not err in concluding that, as commendable as Mother's progress had been, when balanced against her history of drug abuse and mental instability, her repeated failures to overcome her addiction, her lapses in taking psychotropic medication, her outright refusal to take the parenting and personal empowerment classes offered, it was too early to conclude that she was unlikely to relapse to her old ways. Mother's decision to use someone else's prescription cough medication raised serious questions about her judgment, and her understanding of her addiction (despite her completion of several drug treatment programs). Additionally, when the court considered Mother's petition there was new evidence showing Mother's counselor at the Orange County Mental Health doubted Mother had the ability to effectively parent four children. Mother lacked of motivation to do things for herself, such as finding a safe place to live. In short, the court could reasonably infer Mother had not yet resolved the mental instability and substance abuse problems that formed the primary basis for the children's detention. (See *Casey D.*, *supra*, 70 Cal.App.4th 48.) Additional reunification would not have promoted the stability her children desired, and thus would not have promoted their best interests.

B. The Benefit Exception

Father contends the juvenile court erred by refusing to apply the benefit exception of section 366.26, subdivision (c)(1)(B)(i). Our standard of review is

established. We consider the evidence in the light most favorable to the judgment and uphold it unless no rational fact finder could reach the same conclusion.

(See *In re Heather B.* (1992) 9 Cal.App.4th 535, 562-563.) We resolve all conflicts and indulge all inferences in favor of the respondents. If any substantial evidence supports the juvenile court's decision, we affirm. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)

At a permanency hearing, the court determines a permanent plan of care for a dependent child. (*Casey D., supra*, 70 Cal.App.4th at p. 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*)). An exception to the adoption preference occurs when termination of parental rights would be detrimental to the child because the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent bears the burden of proof on both these prongs: (1) that visitation was regular; and (2) that the child would benefit from continuing the relationship. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.)

In *Autumn H.*, the court articulated a test for determining whether a child would benefit from continuing the parental relationship. To succeed under this test, the parent must establish that "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) In evaluating this issue, the court must "balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) "The exception must be examined on a case-by-case basis, taking

into account the many variables which affect a parent/child bond[, including t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Id.* at pp. 575-576.)

"[P]leasant and cordial . . . visits are, by themselves, insufficient to mandate a permanent plan other than adoption." (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) "[F]requent and loving contact" may also be insufficient to establish the type of beneficial relationship "contemplated by the statute." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) "'Interaction between [a] natural parent and child will always confer some incidental benefit to the child[.]" but the basis of a beneficial relationship is that the parents have "occupied a parental role[.]" (*Id.* at pp. 1418-1419.) "'While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.'" (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).)

We recognize there is a split of authority regarding the applicable standard for reviewing a juvenile court's decision as to whether the parental relationship exception to termination of parental rights should be applied. On the one hand, some courts have applied the abuse of discretion standard. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [applying parental benefit exception is a "quintessentially discretionary determination"].) Other courts employ the substantial evidence standard. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) However, "The practical differences between the two standards of review are not significant.

'[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling Broad deference must be shown to the trial judge. The reviewing court should interfere only "if [it] find[s] that under all the evidence, viewed most favorably in support of the [juvenile] court's action, no judge

could reasonably have made the order that he did.’ . . .” [Citations.]” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) Under either standard of review, we find the juvenile court did not err in concluding the children’s need for permanency outweighed any benefit which they might have derived from maintaining their biological connection with Father.

SSA concedes Father correctly focuses on the second prong of the benefit exception. It explains that despite Father’s two month drug relapse and concurrent lapse in visits in mid-2006, Father had otherwise maintained a commendable level of visits throughout this lengthy case.

However, Father failed to meet his burden of proof as to the second prong of the benefit-exception test. Father points to favorable evidence that he actively engaged with the children during his visits, which usually consisted of playing in the park and trips to the library. In addition to playing, Father read to them, fed them, helped them with their homework, and disciplined them when necessary. He concludes, “These are not signs of an inattentive parent.” He points to evidence the children reacted negatively to his brief absence in 2006. In recent months, monitors reported the children were affectionate with Father during visits, giving him hugs, and calling him “daddy.” Nevertheless, we find the court reasonably concluded this evidence was insufficient to show the benefits from a continued relationship with Father outweighed the benefits from a stable and permanent home provided by adoption.

Father was required to show he occupied the role of a parent in his children’s world. Over the three years of dependency proceedings, Father never progressed past monitored visitations except for a brief period of time from late 2005 to the spring of 2006. There was no “day-to-day interaction, companionship[,] and shared experiences” with the child. (*See Casey D.*, *supra*, 70 Cal.App.4th at pp. 50-51.) Rather, the evidence showed the children were excited about being placed in a prospective adoptive home. They wanted the same stability they saw other children from their group

home achieving. They desperately wanted someone to be able to meet their daily needs and give them emotional support.

It is not surprising the children asked about Father when he suddenly stopped visiting. K.J. pouted and O.J. expressed anger. Their reactions indicate they enjoyed visits, and they were upset Father had failed them again, but it did not prove an overriding significant bond sufficient to prevent adoption. The social workers and monitors reported the children did not seem upset when visits normally ended with their parents. As aptly noted by county counsel, “The children’s most negative reactions were reserved for their fears regarding instability rather than any worries as to their relationship with” Father. While Father’s love for his children and his relationship with them certainly provides them with some incidental benefits, it does not fulfill their need for a full-time stable parent.

Finally, we note Father’s reliance on the recent case of *In re S.B.* (2008) 164 Cal.App.4th 289, is misplaced. The juvenile court did not base its denial of the benefit exception on, as in *S.B.*, an “unenforceable promise” by the prospective adoptive parent of continued parental visits post termination. (*Id.* at p. 300.) Rather, as we have noted, ample evidence supported the juvenile court’s conclusion here that termination served the children’s best interests even if visits ceased. Applying the *Autumn H.* factors, the evidence showed the benefits of adoption outweighed any detriment ensuing from termination. (See *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575 [well-being derived from continuing parent-child relationship must always be measured against legislative preference for adoption].)

C. Adoptability

Both Mother and Father challenge the juvenile court’s conclusion O.J. and K.J. were adoptable. They argue the court had insufficient evidence to make the determination, claiming SSA’s initial assessment report was outdated by the time of the final permanency hearing. They claim the children’s history of behavioral problems,

ages, and difficulty in finding placement as an opposite sex sibling set made the children extremely difficult to place. True, the record supports the contention the children were difficult to place, but does not support the parent's claim the children were not adoptable.

“The issue of adoptability posed in a section 366.26 hearing focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent ‘waiting in the wings.’ [Citations.] [¶] Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. [Citation.]” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.)

In SSA's report prepared in February 2007, for the first scheduled permanency hearing the children were evaluated and deemed adoptable. O.J. was eight years old and his sister K.J. was seven years old. Both were described as “attractive” children, in good physical healthy, and developmentally on target. They were playful, well-behaved, and made friends easily. There is no evidence or reason to suspect the children's medical health or developmental status changed over the next year before the second permanency hearing in April 2008.

The children's behavioral issues, which Mother argues demonstrated “maladaptive behaviors” occurred early on in the dependency proceedings, and were largely resolved through therapy. Throughout 2005 both children participated in counseling services, and by the end of the year, the social worker reported the treatment goals had been met and the children discontinued therapy. The counselor stated O.J. had

“become very comfortable and secure in [his placement,] and his behavior ha[d] improved significantly.” Similarly, K.J.’s temper tantrum behaviors had decreased and K.J. had “become comfortable and secure” in her placement.

Subsequent addendum reports prepared by SSA before the next permanency hearing gave sufficient updates to the court about the children’s emotional condition. A report in March 2007 noted the children were in therapy as they were showing signs of “anxiety and maladaptive behaviors” caused in large part by their desire for stability and a more certain living situation. At the time, Mother was promising the children they would be reunified. K.J. was torn between wanting to please Mother by living with her, and wanting to stay in her current placement. The children had been abruptly forced from the security of their first placement with relatives, they were in a second placement with relatives, and they expressed fear about being forced to live somewhere else. Indeed, in hindsight there were other forces at work that undermined the two relative placements. The children were not entirely at fault. The stress of accommodating the parents’ separate visitation schedules, the many frustrating delays in the legal proceedings, and the parental interference with the children’s best interests are also to blame.

When the children’s prospective adoptive placement ended in mid-2007, SSA continued to report on the children’s well-being. During this difficult transition time the children were understandably confused, but otherwise exhibited no major behavioral problems. In August 2007, they were described as being active, playful and well-behaved at the group home. By November 2007, the social worker noted the children were having a difficult time because they were dealing with many social workers and they were seeing their peers leaving the group home before them. O.J. started misbehaving, and K.J. began carrying a blanket and sucking her thumb. These behaviors were not severe enough to undermine an adoptability finding. Despite a heart-wrenching year of feeling abandoned, the children continued to do well in school and interacted well

with their friends. Although the children were difficult to place because of the visitation schedule with the parents, their genders, and being a sibling set, the court correctly determined they were adoptable.

Moreover, SSA reported O.J. and K.J. were placed in a prospective adoptive home. They met M.E. in February 2008 and immediately liked her. The social worker reported that after a gradual transition, the children quickly adjusted to their placement, they were happy, and they were not exhibiting any behavioral problems. M.E. indicated she was committed to permanently caring for the children and her adoptive home study was complete and approved. This is further evidence to support the juvenile court's finding the children were adoptable.

III

The order is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.